Ross Stores, Inc. *and* David L. Jumper. Case 5–CA–23991

September 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX, LIEBMAN, HURTGEN, AND BRAME

On April 5, 1995, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified below, and to adopt his recommended Order, as modified and set forth in full below.[2]

1. The Respondent has excepted to the judge's finding that Section 10(b) of the Act does not bar litigation of the allegations of 8(a)(1) violations in this case.[3] For the reasons that follow, we find no merit in the Respondent's exception or in the arguments made by our dissenting colleagues.[4]

On August 13, 1993, Charging Party David Jumper timely filed his initial, handwritten charge alleging his belief that the Respondent had terminated him earlier that day because of his union activity.[5] On March 4, 1994, Jumper filed an amended charge. This charge repeated his earlier allegation of a discharge in violation of Section 8(a)(3) and added allegations that the Respondent violated Section 8(a)(1) by a May 1993 statement by Respondent's supervisor, Michael Simondi, to Jumper that Jumper could not solicit on the Respondent's premises, and by a June 1993 statement by the Respondent's vice president David Morrison to employees that created the impression among them that it would be futile to select a union as their collective-bargaining representative.

On March 18, 1994, the General Counsel issued a complaint that included all three allegations of the amended charge. In answer, the Respondent denied committing any unfair labor practices. It further raised an affirmative defense, based on the 10(b) limitations period, contesting the General Counsel's jurisdiction to litigate the two allegations of 8(a)(1) violations that were added in the amended charge. The judge rejected this defense because he found that the 8(a)(1) allegations arose out of the Respondent's overall efforts to resist the Union, the discriminatee (Jumper) was directly or indirectly subjected to this interference with Section 7 rights, and the unlawful conduct was evidence of union animus in support of the 8(a)(3) discharge allegation in the original, timely filed charge.

Standing alone, the 8(a)(1) allegations were not timely filed within the meaning of Section 10(b) because they involved events occurring more than 6 months prior to the filing of the amended charge. These allegations can survive a 10(b) challenge only if they are "closely related" to the allegation in the original, timely filed charge. See generally, *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959). The Board's test for determining whether allegations are closely related was summarized in *Nickles Bakery of Indiana*, 296 NLRB 927, 928 (1989).

> First, the Board will look at whether the otherwise untimely allegations involve the same legal theory as the allegations in the pending timely charge. Second, the Board will look at whether the otherwise untimely allegations arise from the same factual circumstances or sequence of events as the pending timely charge. Finally, the Board may look at whether a respondent would raise similar defenses to [the] allegations. [Footnotes omitted.]

Under the foregoing test,[6] the Board has generally found that there is:

> [A] sufficient relation between the charge and [subsequent allegations] in circumstances involving "acts that are part of the same course of conduct, such as a single campaign against a union," *NLRB v. Central Power & Light Co.*, 425 F.2d 1318, 1321 (5th Cir. 1970), and acts that are all "part of an overall plan to resist organization." *NLRB v. Braswell Motor Freight Lines*, 486 NLRB F.2d 743, 746 (7th Cir. 1973).[7]

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc.*, 325 NLRB 17 (1997).

[3] Sec. 10(b) provides, in relevant part, "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board."

[4] Chairman Truesdale and Members Fox and Liebman join in this section of the decision. Members Hurtgen and Brame have separately dissented.

[5] Although Jumper's charge form does not specify the particular subsection of Sec. 8(a) that the Respondent allegedly violated, it is obvious that the allegation of a discharge based on union activity falls under the proscription in Sec. 8(a)(3).

[6] See also *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988). Although both *Nickles Bakery* and *Redd-I* involved the relatedness of complaint allegations to an unfair labor practice charge, the same test applies for determining whether otherwise time-barred allegations in an amended charge relate back to allegations of an earlier timely filed charge. E.g., *Citywide Service Corp.*, 317 NLRB 861, 862 (1995).

[7] *Nickles Bakery of Indiana*, supra at 928 fn. 7. Accord: e.g., *Pioneer Hotel & Gambling Hall*, 324 NLRB 918 (1997); *Recycle America*, supra; *Pincus Elevator & Electric Co.*, 308 NLRB 684, 690 fn. 2 (1992), enfd. mem. 998 F.2d 1004 (3d Cir. 1993); *Outboard Marine Corp.*, 307 NLRB 1333, 1334 (1992), enfd. 9 F.3d 113 (7th Cir. 1993), *Well-Bred Loaf, Inc.*, 303 NLRB 1016 fn. 1 (1991); *Southwest Distributing Co.*, 301 NLRB 954, 955 (1991); *Harmony Corp.*, 301 NLRB

Furthermore, the Board will find a sufficient factual relationship "whether or not the acts are of precisely the same kind and whether or not the charge specifically alleges the existence of an overall plan on the part of the employer." *Recycle America*, 308 NLRB 50 fn. 2 (1992), citing *Jennie-O Foods, Inc.*, 301 NLRB 305 (1992).

In *Nippondenso Mfg. U.S.A.,* 299 NLRB 545 (1990), however, two of the members of the three-member Board panel that decided the case seemingly applied a different interpretation of the *Nickles Bakery* test in dismissing the complaint on Section 10(b) grounds.[8] The original charge in *Nippondenso* had alleged the discharge of a union organizing committee member in violation of Section 8(a)(3). The resulting complaint included several allegations of no-solicitation and no-distribution rules directed against union activity in violation of Section 8(a)(1), but the complaint did not include an 8(a)(3) discharge allegation. The Board panel majority found that the General Counsel had failed to establish a factual nexus between the allegations in the charge and those set forth in the complaint.[9] It rejected the argument that the requisite factual relationship could be based solely on the legal theory that the acts at issue in the charge and complaint took place "during, and in order to quell, a union campaign." The panel majority further found that "apart from their relationship to the same organizing campaign, the allegations in the charge and those set forth in the complaint arise from different factual circumstances." Id. at 546. In this regard, the panel majority noted the absence of any contention that the discriminatee alleged in the charge was disciplined for engaging in the types of protected activity that the 8(a)(1) conduct alleged in the complaint was directed against.

The Board has not subsequently applied the reasoning of the *Nippondenso* panel majority when addressing whether allegations are closely related under the *Nickles Bakery* test. It has instead consistently and repeatedly applied the precedent cited and discussed earlier in this opinion. Where, as here, a respondent employer has relied on *Nippondenso* in support of a 10(b) defense, the Board has distinguished *Nippondenso* from the case at issue. *Recycle America*, 308 NLRB at 50 fn. 5; *Drug Plastics*, 309 NLRB 1306, 1308 fn. 2 (1992).

However, in *Drug Plastics & Glass Co. v. NLRB,* 44 F.3d 1017 (D.C. Cir. 1995), the court rejected the Board's attempts to distinguish *Nippondenso*:

> The only justifications offered in the decision of the administrative law judge adopted by the Board for the relatedness of the allegations in the complaint and the single allegation in the charge is that they "arise out of the same alleged anti-union campaign," and that they both bear on anti-union animus. The Board cannot employ this basis as "adequate relatedness" consistent with its decision in *Nippondenso Mfg. U.S.A., Inc.*; thus, the Board's actions here is an unexplained deviation from its own precedent. (Internal citations omitted.) 44 F.3d at 1021.[10]

The judge in the present case referred to the distinctions drawn by the Board in *Drug Plastics* as a basis for rejecting the Respondent's reliance on *Nippondenso* to support its 10(b) defense. In light of the intervening D.C. Circuit decision in *Drug Plastics* we have decided to overrule *Nippondenso* to the extent that it conflicts with *Nickles Bakery* and other precedent cited above consistently holding that the requisite factual relationship under the "closely related" test may be based on acts that arise out of the same antiunion campaign.

Based on the foregoing, we agree with the judge that the 8(a)(3) discharge allegation in the original charge and the 8(a)(1) allegations in the amended charge are closely related under the test of *Nickles Bakery* and *Redd-I*. First, both the 8(a)(3) and the 8(a)(1) allegations share a common legal theory based on the Respondent's animus in opposition to the Union's organizational campaign. The charge alleged a discharge motivated by animus against Jumper's union activity. The amended charge alleged a coercive act manifesting specific animus against Jumper (an oral no-solicitation rule) and a coercive act manifesting general animus against union activity (Morrison's speech to employees). It is well established that the common aspect of animus in such circumstances is sufficient to meet the *Nickles Bakery/Redd-I* requirement that essentially similar legal theories underlie the different allegations. E.g., *Fiber* Products, 314 NLRB 1169 (1994), enfd. *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 941 (4th Cir. 1995). The fact that the timely filed charge allegation and the amended charge allegations involve different sections of the Act do not preclude this finding of a sufficient legal relationship. Id. at 1169 fn. 3. Second, we agree with the judge that the allegations share similar factual circumstances. Each alleged incident arose in the context of a single organizational campaign and was part of the Respondent's overall efforts to resist that campaign. As set forth above, with the exception of *Nippondenso*, the Board and several courts have consistently found a sufficient factual nexus

578, 578–579 (1991); *Beretta U.S.A. Corp.*, 298 NLRB 232 fn. 1 (1990), enfd. 943 F.2d 49 (4th Cir. 1991); *Van Dyne Crotty Co.*, 297 NLRB 899, 900 (1990).

[8] At the time Nippondenso issued, the Board was composed of four members, so the panel majority was not a majority of the Board.

[9] The third panel member, former Chairman Stephens, concurred in dismissing the complaint on 10(b) grounds, but found it unnecessary to pass on whether the charge and complaint were closely related. 299 NLRB at 546. Instead, he relied on the reasoning of his partial dissent in *Redd-I*, 290 NLRB at 1119–1121.

[10] The decision of this three-member panel of the D.C. Circuit reversed an earlier panel majority decision which agreed with the Board that *Nippondenso* was distinguishable, venturing that the Board no longer approved of the reasoning in that case. *Drug Plastics & Glass Co., v. NLRB*, 30 F.3d 169, 174 (D.C. Cir. 1994).

between allegations in such circumstances, and we have overruled *Nippondenso* to the extent that it conflicts with such precedent.[11] Finally, as to common defenses, in both instances the obvious defense available to the Respondent was that it did not seek to unlawfully restrict Jumper's union activity by the manager's placing restrictions on Jumper's solicitation activities or by Jumper's subsequent discharge. Having found that the 8(a)(1) allegations in the amended charge are closely related to the 8(a)(3) allegation in the original, timely filed charge, we affirm the judge's conclusion that Section 10(b) does not bar litigation of the 8(a)(1) allegations.

On the basis of the Board's precedents, with the aberrant *Nippodenso* eliminated, we affirm the judge's finding that a sufficient factual relationship exists between the 8(a)(3) discharge allegation in the original charge and the 8(a)(1) allegations in the amended charge. An investigation of Jumper's discharge, alleged to have been in retaliation for his union activity, would logically entail an investigation of the Respondent's prior indications of animus toward the organizing campaign and in particular its dealings with Jumper regarding that campaign. Such an investigation thus would encompass the admonition to Jumper not to distribute union literature on the premises and Vice President Morrison's speech about the Union to the employees. Since all these acts allegedly occurred within a period of several months and were essentially alleged as part of an overall plan to resist the union campaign launched in the spring of 1993, they satisfy the basic *Redd-I* tests of relatedness in theory, factual circumstances, and employer defenses.[12]

Accordingly, having found that the 8(a)(1) allegations in the amended charge are closely related to the 8(a)(3) allegation in the original, timely filed charge, we affirm the judge's conclusion that Section 10(b) does not bar litigation of the 8(a)(1) allegations.

As to the merits of the 8(a)(1) allegations, we adopt the judge's finding that Respondent's operations manager Simondi orally promulgated an unlawfully overbroad no-solicitation rule in separate late May or early June one-on-one conversations with David Jumper and another employee, who had been posting union literature in non-working areas. *Highland Yarn Mills*, 313 NLRB 193, 194 (1993). In doing so, we do not rely on the judge's implication that a no-solicitation, no-distribution rule as set forth in an August 27, 1991 memo was also unduly broad. See *Our Way, Inc.,* 268 NLRB 394 (1983).

2. We do not agree, however, with the judge's finding that the Respondent's vice president, Morrison, violated Section 8(a)(1) when he stated during a regularly scheduled quarterly meeting of employees in late May that "he would do anything in his power to keep the union out of the building."[13] The judge found that such a statement implies a willingness to take unlawful reprisals against employees. In the circumstances of this case, there is no sufficient objective basis for finding that employees would reasonably tend to view Morrison's statement as a threat. He did not expressly or implicitly refer to any adverse employment consequences of unionization. He had not himself engaged in any other unfair labor practices. Indeed, the only contemporaneous unfair labor practices committed by the Respondent were the aforementioned oral no-solicitation statements by Simondi. The record does not indicate the extent to which employees other than the two directly addressed by Simondi became aware of his statements.

The cases cited by the judge in support of his unfair labor practice finding involved similar statements accompanied by other threats or circumstances indicating possible retaliation. See *Hickory Creek Nursing Home*, 295 NLRB 1144, 1148 (1989), affd. sub nom. *NLRB v. Health Care Management Corp*., 917 F.2d 1304 (6th Cir. 1990) (supervisor in a one-on-one meeting also stated that employees could lose everything and that owner was "a very smart and tough businessman"); *Great Dane Trailers*, 293 NLRB 384, 388–389 (1989) (statement accompanied by threat to discharge employees soliciting or distributing on company time); *Morrison Cafeteria Co.* 214 NLRB 523, 524 (1974) (manager in one-on-one meeting identified individual employees as union activists and stated that he would not tolerate union activity).

In contrast to those cases, the Respondent cites *Standard Products Co.*, 281 NLRB 141, 148 (1986), enfd. in part 824 F.2d 291 (4th Cir. 1987), where the Board adopted the administrative law judge's conclusion that a manager's statement that "he would do everything in his power to keep the union out" did not violate Section 8(a)(1).[14] The judge found the statement to be "some-

[11] Our dissenting colleague would adhere to *Nippondenso*, without reference to the precedent with which it conflicts, and would rely on that case to find that litigation of the 8(a)(1) allegations is time barred. As previously stated, we have overruled *Nippondenso* as an unreasonably restrictive view of the factual-relatedness requirement in the *Nickles Bakery/Redd-I* test.

[12] See, e.g., *Jennie-O Foods*, 301 NLRB 305 (1991), citing *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743 (7th Cir. 1973). As the court noted in *Braswell*, what must be guarded against is allowing the General Counsel to expand a charge upon his own initiative to include allegations that have no reasonable nexus with the charge that put the investigation in motion. Here, as in *Braswell*, the alleged acts of coercion and retaliation have such a nexus. Consequently, and contrary to Member Brame's dissenting view, the Respondent's animus toward both Jumper and the Union's organizing campaign are linked by more than a mere temporal provenance, or by a theoretical presumption of uniform employer behavior.

[13] Although Members Hurtgen and Brame would dismiss the 8(a)(1) allegation on 10(b) grounds, they agree with Chairman Truesdale that these allegations should also be dismissed on its merits. For the reasons set forth in their partial dissent, Members Fox and Liebman would find, contrary to their colleagues, that Morrison's statement violated Sec. 8(a)(1) of the Act. Accordingly, they do not join in this portion of the decision.

[14] There is no record basis for speculation by the judge in the present case that the Board adopted the judge's conclusion in *Standard Products* only because there were no exceptions to that conclusion.

what vague [and] subject to interpretation by the listener." He concluded that the statement, standing alone, did not rise to the level of a threat. We come to the same conclusion as to the statement here. In the absence of any other threatening language or circumstances, and mindful that employer representatives may lawfully state their opposition to a union, we find that employees hearing Morrison's statement would not reasonably believe that he was threatening to go beyond legal bounds in his opposition to the Union. We shall therefore reverse the judge and dismiss the 8(a)(1) allegation based on this statement.

3. We affirm the judge's conclusion that the Respondent's discharge of David Jumper violated Section 8(a)(3) and (1) of the Act.[15] Our dissenting colleague challenges two aspects of the judge's analysis. The dissent would find that the General Counsel has failed to present evidence of union animus sufficient to meet the initial burden of proving that such animus motivated the discharge. The dissent would also reverse the judge's finding discrediting testimony by the Respondent's human resources specialist about the Respondent's attendance policies that allegedly justified Jumper's discharge.

On the issue of animus, the dissent relies on the view, rejected by a Board majority in section 1 of this decision, that Section 10(b) bars litigation of the 8(a)(1) allegations here. He also relies on the finding by a different Board majority in section 2 of this decision that Respondent's vice president, Morrison, did not violate the Act when he told employees that "he would do anything in his power to keep the union out of the building." Even if we were to agree with our colleague's 10(b) argument, however, there exists no bar to consideration of the alleged 8(a)(1) violations as evidence of animus motivating discharge.[16] Both Morrison's speech and the overbroad oral no-solicitation rule dictated directly to Jumper and another employee, following their posting of union literature, took place within six months of the timely filing of an unfair labor practice charge challenging the discharge. Furthermore, even though Morrison's statement was not unlawful in the context of this case, it is still evidence of animus establishing the Respondent's discharge motive. See, e.g., *Lampi LLC*, 327 NLRB 222 (1998).[17]

On the credibility issue, there is no basis for reversing the judge. The Respondent contends that it lawfully discharged Jumper when his absence from work on August 12, 1993, resulted in an accumulated annual penalty point total for absenteeism that required his discharge. Critical to this argument is the contention that Human Resources Specialist Paula Hoch properly rejected Jumper's request, on the morning of August 12, to reschedule a personal day off request so that he could avoid any penalty points for his absence that day.[18] The judge discredited Hoch's testimony that there was a general rule requiring that "any scheduled time off needs to be requested in advance," or, alternatively, that requests for personal days off required different treatment from requests for vacation time off. Accordingly, he found that Hoch's denial of Jumper's request was not consistent with the Respondent's practice or mandated by its rules.

Contrary to the dissent, there is no basis for reversing the judge's credibility resolution or his resultant finding that the Respondent treated Jumper disparately by denying his request. The alternative rules articulated by Hoch are, on their face, inconsistent and warrant the inference that there was no rule at all requiring an advance request for scheduling personal days off.[19] The two management officials to whom Jumper first directed his request on August 12 evinced no awareness of any such absolute requirement. There is indisputably no written rule. One witness credibly testified that she was granted a personal day off after working 2 hours on that particular day. Indeed, even though the Respondent's handbook does have language arguably requiring that employees schedule *vacations* in advance, the record reveals several instances in which employees requested vacation leave either on the day they took it or after they had already taken it. In sum, the record fails to show that the Respondent has ever denied a time off request for vacation or personal leave, other than Jumper's, because the request was not made in advance.

ORDER

The National Labor Relations Board orders that the Respondent, Ross Stores, Inc., Carlisle, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating or threatening enforcement of no-solicitation rules which would prohibit employees from engaging in union solicitations on nonwork time or in nonwork areas of the facility.

(b) Discharging employees because of their union activity.

[15] Chairman Truesdale and Members Fox and Liebman join in this section of the decision. Member Brame has separately concurred. Member Hurtgen has separately dissented.

[16] Even if the conduct occurred prior to the 10(b) period, it is well established that such conduct may be used to shed light on a respondent's motivation, even though the Board may not give it independent and controlling weight. *Monongahela Power Co*., 324 NLRB 214 (1997).

[17] As stated in their dissenting opinion, Members Fox and Liebman would find that Morrison's statement violated Sec. 8(a)(1). They agree, however, that it would be evidence of animus even if it is not alleged or found to be independently unlawful.

[18] Jumper sought time off in order to attend to a medical emergency involving his girlfriend.

[19] Because we are simply finding that the Respondent's claimed policies did not in fact exist, we are not, as our dissenting colleague contends, second-guessing the Respondent's distinctions between different kinds of leave.

(c) In any or like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer David Jumper full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make David Jumper whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Carlisle, Pennsylvania copies of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 1993.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBERS FOX AND LIEBMAN, dissenting in part.

We agree with Chairman Truesdale and the judge that the Respondent violated Section 8(a)(3) and (1) by discharging employee David Jumper because of his union activity. We further agree, for the reasons set forth in the majority opinion, that the Respondent violated Section 8(a)(1) by promulgating an overly broad no-solicitation rule. However, we disagree with our colleagues' finding that the Respondent did not violate Section 8(a)(1) by threatening that the Respondent would do anything in its power to keep the Union out of the building. Rather, like the judge we would find this statement constituted a violation of Section 8(a)(1).

In late May 1993, David Morrison, the Respondent's vice president for distribution, addressed the employees at a regularly scheduled quarterly meeting. He acknowledged the ongoing union activity and told the employees that they did not need a union. He further stated that "he would do anything in his power to keep the union out of the building." The judge found that this statement violated Section 8(a)(1) of the Act because it conveyed or implied a willingness to take reprisals against employees in order to prevent them from achieving union representation. In support of his finding the judge relied on *Hickory Creek Nursing Home*, 295 NLRB 1144, 1148 (1989), affd. sub nom. *NLRB v. Health Care Management Corp*., 917 F.2d 1304 (6th Cir. 1990); *Great Dane Trailers*, 293 NLRB 384, 388–389 (1989); and *Morrison Cafeteria Co.*, 214 NLRB 523, 524 (1974). We agree with the judge.

Our colleagues find that Morrison's statement, "standing alone, did not rise to the level of a threat" and that "in the absence of any other threatening language or circumstances . . . employees hearing Morrison's statement would not reasonably believe that he was threatening to go beyond legal bounds in his opposition to the Union." Our colleagues distinguish the cases relied on by the judge, which all found similar statements to violate Section 8(a)(1), on the ground that the statements in those cases were accompanied by other threats or circumstances indicating possible retaliation. Our colleagues rely instead on *Standard Products Co*., 281 NLRB 141, 148 (1986), in which an administrative law judge dismissed a similar allegation, finding the statement to be "somewhat vague [and] subject to interpretation by the listener."

Contrary to our colleagues, we find that employees reasonably would construe Morrison's statement to convey the message that the Respondent would do "anything in his power," including resorting to unlawful conduct, to maintain its union-free status. The applicability of Section 8(a)(1) turns on whether a given statement would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. In assessing the Respondent's statement under that standard, we take into account "the economic dependence of the

employees on their employers, and the necessary tendency of the former . . . to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617 (1969).

In our view, Morrison's statement was not merely a statement by the Respondent setting forth its views on unionization permissible under Section 8(c) of the Act. Rather, the statement sets forth what the Respondent would *do* to prevent unionization. Morrison did not clearly tell employees that the Respondent would limit how far it would go to prevent unionization to lawful conduct, and nothing about his statement would lead employees to presume that "anything in my power" would be limited to "anything within legal bounds." As employees are well aware, their employer has the "power" to control how they are treated on the job and indeed, whether or not they have jobs at all. Thus, without clarification, the statement would reasonably be understood by employees to mean that the Respondent would exercise the full range of that power, if necessary to maintain its union-free status. The real message to employees is that it would therefore be futile or inadvisable for them to engage in union activity. In our view, such a statement has a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights and therefore violates Section 8(a)(1). *Aluminum Casting & Engineering Co.*, 328 NLRB No. 2, slip op. at 2 (1999); *Gravure Packaging*, 321 NLRB 1296, 1299 (1996).

Our colleagues mistakenly rely on the "absence of evidence of any other threatening language or circumstances" to find that employees would not reasonably believe that Morrison was threatening to go beyond legal bounds in this opposition to the Union. While Morrison's speech itself did not contain any other threatening statement, the Respondent did, at around the same time, unlawfully inform employees that they could not solicit on behalf of the Union on its premises, and later unlawfully discharged employee Jumper for engaging in union activity. Thus, the statement was not made by an employer completely innocent of any unfair labor practices. These violations, while not occurring simultaneously with Morrison's statement, certainly illustrated to employees that the Respondent was willing to engage in unfair labor practices and served as reminders to employees that the Respondent would not limit itself to lawful means in order to prevent unionization. Thus, while we believe that Morrison's statement was by itself coercive (even without consideration of its context), the other unfair labor practices committed by the Respondent provide additional support for our finding that Morrison's statement could reasonably have been understood by employees to mean that the Respondent would be willing to resort to unlawful conduct to oppose unionization. Further, we find *Standard Products*, supra, relied on by our colleagues, to be inconsistent with our other case law cited above which consistently finds similar statements by employers to be violative of Section 8(a)(1). Accordingly, we would overrule it.

MEMBER HURTGEN, dissenting in part.

Contrary to the majority, I would dismiss the complaint in its entirety. First, I would adhere to the Board's decision in *Nippondenso Mfg., U.S.A.,* 299 NLRB 545 (1990), and I would find that the two untimely filed 8(a)(1) allegations are not closely related to the timely filed 8(a)(3) allegation. Therefore, these 8(a)(1) allegations are barred by Section 10(b) of the Act. Second, I would dismiss the 8(a)(3) allegation concerning the discharge of employee Jumper because the General Counsel failed to show that Jumper's union activities were a motivating factor behind the Respondent's decision to discharge him.

The sequence of events involved here is as follows. In about May 1993, the Union began its organizing activities among the Respondent's employees. Sometime in May or early June, Respondent's operations manager, Simondi, observed Jumper and another employee leaving the men's room. Simondi then observed union literature posted in the men's room. He removed the literature, and thereafter spoke to the two employees separately. He told Jumper that "there was no solicitation on these premises." He did not mention the postings, and the employees received no warnings or discipline.

Also in late May, at a regular scheduled quarterly meeting with employees, David Morrison, Respondent's vice president for distribution, told the assembled employees that "he would do anything in his power to keep the Union out of the building."

On June 1, the Union advised the Respondent of the names of 15 employees who were on its employee organizing committee. Jumper and his fiancée, Kathy Curtis, were among those named. Over 2 months later, on August 13, Jumper was discharged because he had accumulated more than the maximum number of "points" due to excessive absenteeism.

On August 13, Jumper filed a charge alleging that the discharge was imposed on him because of his union activities. Almost 7 months later, on March 4, 1994, Jumper filed an amended charge, again alleging the unlawful discharge, but adding the 8(a)(1) allegations concerning Simondi's telling Jumper, in May 1993, that there was no solicitation on the premises, and Morrison's May 1993 talk to the employees.

The March 4 amended charge was filed more than 6 months after the alleged 8(a)(1) conduct. The issue is whether the charge can nonetheless be deemed timely because it is "closely related" to the 8(a)(3) charge of August 13.

In *Redd-I, Inc*., 290 NLRB 1115 (1988), the Board set forth the factors that it would consider in determining

whether otherwise untimely allegations of violations of the Act are closely related to timely filed allegations so that the former are not time barred under Section 10(b).[1] First, the Board will look to see if the untimely allegations involve the same legal theory as the timely allegation. Second , the Board will look at whether the two sets of allegations arise from the same factual circumstances or sequence of events. Third, the Board will look at whether a respondent would raise similar defenses to the timely and untimely allegations

In *Nickles Bakery*, the Board reaffirmed *Redd-I*, and dismissed a complaint on 10(b) grounds. In *Nippondenso*, the Board applied the same test, and again dismissed. In *Nippondenso*, as here, there was a timely filed 8(a)(3) charge alleging a discharge, and untimely 8(a)(1) complaint allegations alleging interference with the wearing of union insignia and the posting of union literature. The Board found that the 8(a)(1) allegations were not closely related to the 8(a)(3) allegation.

The application of the *Redd-I* test to the instant case makes it clear that the 8(a)(1) allegations are not closely related to the 8(a)(3) allegation. The 8(a)(3) allegation is based upon discharge and motive, i.e., that the motive for the discharge was union activity. The 8(a)(1) allegations do not involve a discharge and do not involve motive. They involve only the issue of whether certain comments and conduct would reasonably tend to interfere with Section 7 rights.

Second, the discharge did not arise from the same factual circumstances or sequence as the 8(a)(1) conduct. There are only two discernable relationships between the 8(a)(3) timely allegation and the untimely 8(a)(1) allegations: (1) the alleged discriminatee (Jumper), who was discharged in mid-August 1993, was one of two employees told by a manager in May that there was to be no solicitation on the Respondent's premises; (2) Vice President Morrison who addressed the employees in late May, was the person who made the decision to discharge Jumper. As to the first point, there was no allegation that Jumper was discharged for distributing literature. In fact, he was not warned or disciplined. Indeed, there was a 3-month gap between the manager's statement and the discharge. As to the second point, as discussed infra, Morrison's comment was lawful. And, there was almost a 3-month gap between the comment and the discharge.

Third, the defenses to the 8(a)(3) allegations differ from the defenses to the 8(a)(1) allegation. The defense to the former would primarily be that there was a benign motive for the discharge. The defense to the latter would be that the conduct did not occur or that it was not the kind of conduct that would reasonably tend to coerce employees as to their Section 7 rights.

[1] See also *Nickles Bakery of Indiana*, 296 NLRB 927 (1992).

In sum, two of the *Redd-I* elements are wholly missing, and a third is, at most, only marginal. Thus, I would find that there is a 10(b) bar to the 8(a)(1) allegations.[2]

The majority here overrules *Nippondenso*, and asserts that "closely related" means only that timely and untimely filed allegations are based on acts that arise out of the same anti-union campaign. That is contrary to *Redd-I*. As in *Nippondenso*, I would find that there must be more of a nexus between the allegations to deem them "closely related."

My colleagues assert that *Nippondenso* is an "aberrant" case. However, as I have shown, *Nippondenso* fits comfortably within the *Redd-I* tests. My colleagues respond by essentially altering the *Redd-I* test. They would include the issue of whether the General Counsel, as part of his investigation of an 8(a)(3) charge, would likely discover alleged 8(a)(1) conduct directed to the discriminatee.[3] But this is not a part of the *Redd-I test.* I would concede that the General Counsel may well uncover the alleged 8(a)(1) conduct. However, as and when he does so, he can apprise the Charging Party of his right to file an amended charge alleging the 8(a)(1) conduct. In virtually every case, the amendment will be timely and thus 10(b) problems will not exist.[4] And in the rare case where the amendment would be untimely, the conduct can still be used in support of the 8(a) (3) allegation.

I also would not find that employee Jumper was discharged for engaging in union activities. As found by the judge, Jumper had an attendance problem at work, dating back to his probationary period in 1991. Under the Respondent's progressive attendance policy, Jumper had accumulated enough "points" (due to absenteeism) by May 1993, so that any additional points would be cause for dismissal. The judge found nothing disparate or discriminatory in the assessment of these points.

On August 11, Curtis, Jumper's fiancée, was injured at work. That night, Jumper took her to the hospital, and it was learned that she would have to return the next morning for tests. Jumper felt that he should take her to the hospital on August 12 and remain with her.

[2] Although I would dismiss the allegation concerning Morrison's remarks to employees as being barred by Sec. 10(b) of the Act, the majority is deciding the allegation on its merits. I therefore will also join Chairman Truesdale and Member Brame and find that Morrison's simply stating that he would do anything in his power to keep the Union out of the building does not imply that he would resort to unlawful acts to maintain a union-free status. Thus, I would dismiss that allegation on the merits as well. See *Aluminum Casting & Engineering Co*., 328 NLRB No. 2 fn. 7 (1999).

[3] In *Drug Plastics v. NLRB*, 44 F.3d 1017, the D.C. Circuit criticized the Board for an unexplained departure from *Nippondenso*. In the instant case, the Board claims that *Nippondenso* was an aberration and overrules it. This approach fares no better. As shown, *Nippondenso* itself fits comfortably within *Redd-I*.

[4] For example, in this case, the 8(a)(3) charge was filed on August 13, and the investigation would normally be conducted in August and September. The alleged 8(a)(1) conduct occurred in May or June. Inexplicably, the 8(a)(1) amendment was not made until March of the following year.

Jumper reported for work at 7 a.m. on August 12. He asked Operations Manager Fort if he could take the day off, without accumulating more points, by switching a personal day (his birthday) from previously scheduled August 16 to the 12th. This request was passed along to two other managers, and deferred until the arrival of Paula Hoch, the human resources specialist. When Hoch arrived, Jumper renewed his request to switch his personal day to the present day, the 12th. Hoch told him that he could not, because such a request had to be made in advance. Jumper told Hoch to give him the day off or the points, because he was leaving. Hoch warned him of the consequences (additional points) if he left, and he left. He had not asked for vacation time other than the previously scheduled personal day. The next day, vice president for distribution, Morrison, discharged Jumper for having excess points.

The judge found that Jumper was discriminatorily discharged because of his position on the employee organizing committee. In doing so, the judge dismissed the testimony of Hoch concerning Respondent's policies. Hoch testified that vacation time and personal days were treated differently. The latter had to be taken as full days of eight hours. And, because of this, personal days had to be *approved* in advance.[5] He further relied on evidence that one employee, at some undisclosed time in the past, had been allowed to take a personal day without earlier requesting it. Based on these findings, the judge found that the Respondent had treated Jumper disparately from other employees.

I disagree. As to the Respondent's policy, it is not for the Board to say whether Respondent has a good reason for distinguishing between vacation days and personal days. Suffice it to say that Respondent has had such a distinction, and that it was applied to Jumper.[6]

Concerning the disparate treatment found by the judge, the only evidence contra to Hoch's testimony was the testimony of one employee to the effect that she was allowed to take a previously unscheduled personal day. We do not know the circumstances behind this alleged indulgence, when it occurred, or who granted the time off. Based on this single incident, I am not willing to find that the Respondent treated Jumper disparately because of his union activities.

In an effort to show animus on the part of the Respondent toward Jumper, the judge relied on his findings that the Respondent had violated Section 8(a)(1) by promulgating an unlawful no-solicitation rule and by Morrison's telling assembled employees that he would do anything in his power to keep the Union out of the building. As the majority has dismissed the allegation concerning Morrison's speech, and because I would also find the no-solicitation allegation time-barred, I see nothing upon which to base a finding of animus against Jumper's union activity. My colleagues argue that, even if I am correct that Morrison's speech was not a threat, that conduct can be used as evidence supporting the 8(a)(3) discharge allegation. I disagree. Section 8(c) provides that if a statement is not a threat or a promise, the statement is not an unfair labor practice and it cannot "be evidence of an unfair labor practice under any of the provisions of this Act."

My colleagues also argue that, even if I am correct as to the 10(b) defense concerning the "no solicitation" comment, that comment would be evidence of the 8(a)(3) violation. However, as discussed above, the relationship between the two is tenuous at best.

In sum, the General Counsel has not established a prima facie case.

Assuming arguendo that the General Counsel had presented a prima facie case sufficient to show that Jumper's union activity was a motivating factor in his discharge, I would find that the Respondent had rebutted it. Jumper was aware that if he did not stay at work when his leave request was denied, he would have acquired enough points for attendance deficiencies to merit his discharge. He left anyway, saying that the Respondent could give him the points. In these circumstances,. I accept Respondent's argument that, in light of the August 12 events, it would have discharged Jumper even in the absence of any union activity.

I would dismiss the 8(a)(3) allegation.

MEMBER BRAME, concurring in part and dissenting in part.

I agree with my colleagues in the majority, for the reasons stated below, that the Respondent discharged David Jumper based on his union activities in violation of Section 8(a)(3) and (1). Like Member Hurtgen, however, I dissent from the majority's overruling of *Nippondenso Mfg.*, 299 NLRB 545 (1990); find the 8(a)(1) allegations time barred under Section 10(b) of the Act; and, even reaching the merits of the alleged threat by Vice President David Morrison, find that the statement was lawful.

The relevant facts follow. The Respondent learned of ongoing union activity among the employees at its Carlisle, Pennsylvania facility about May 13, 1993.[1] On June 1, the Union notified the Respondent of the 15 employees, including David Jumper and his fiancée, Kathy Curtis, who were members of the Union's organizing committee.

In late May or early June, Jumper and another employee posted union literature in the men's room of the facility. Operations Manager Michael Simondi noticed the two leaving the men's room, went in and saw the posted material. Then, without mentioning the posting specifically, Simondi informed the two employees sepa-

[5] Hoch also testified that any scheduled time off had to be *requested* in advance.

[6] Further, the Respondent's handbook states that personal days may be taken at any time agreed upon by the employer and the manager. Clearly, in this case, the manager did not agree.

[1] All dates are 1993 unless otherwise indicated.

rately that "there was no solicitation on these premises." The Respondent took no disciplinary action against the employees based on this incident.

Also in late May, in a meeting with employees, Vice President Morrison addressed the issue of the current union activity, expressing his view that the employees did not need a union and stating that "he would do anything in his power to keep the Union out of the building."

Almost 3 months after the above events, the Respondent discharged Jumper, citing its discipline system for absenteeism and tardiness. Under that system, employees accumulated a designated number of points for each incident of absenteeism or tardiness, with specified and progressively more severe disciplinary actions correlating to different point totals. The system culminated in possible discharge when an employee exceeded 11.5 points, as long as each less serious disciplinary measure had already been taken against the employee. On the employee's anniversary date, his or her point total would be cleared, except that employees who had progressed to the final warning stage during the 1 year would begin the following year at the written warning stage rather than receiving a verbal warning for the first infraction.

As of August 12, the date of the events leading to his discharge, Jumper had accumulated 10 points for the year that would end on his anniversary date of August 19. Having received final warnings during the previous year as well as the current year, Jumper had begun the year at the written warning stage of the disciplinary system, and stood to do the same for the next year. Jumper had scheduled a personal day off, his birthday holiday, during the intervening week, on August 16.

On August 12, Jumper reported to work at 7 a.m. and asked to speak with Operations Manager Bill Fort. He explained to Fort that he had spent much of the previous night at the hospital with Curtis, who had suffered an abdominal injury at work the day before, and that he needed to bring her back to the hospital that morning for further tests. Jumper showed Fort a doctor's note and asked how he could take the day off without being assessed additional points, specifically requesting to change his personal day off from August 16 to that day. Fort, and subsequently two higher managers, declined to respond to Jumper's request, deferring the matter to Paula Hoch, the human resources specialist. As instructed, Jumper worked until Hoch arrived. At 8:15 a.m., 30 minutes before Curtis' appointment, Jumper reiterated his request to Hoch, but was told that he could not change his personal day because vacation days had to be requested in advance.[2] Jumper stated that the Respondent could give him the day or the points, but that he was leaving for the appointment. When Jumper reported the next day, Morrison discharged him.

Jumper filed a charge with the Board on August 13, the day of his discharge, alleging that the discharge was "due to union involvement." On March 4, 1994, almost 7 months after the initial charge and approximately 9 months after the promulgation of the no-solicitation rule by Simondi and the statement to employees by Morrison, the charge was amended to allege that the Respondent violated Section 8(a)(1) by threatening employees and by prohibiting union solicitation on its premises.

1. Contrary to the judge and the majority, I find that the 8(a)(1) allegations are time barred by Section 10(b) of the Act. Moreover, in my view, the majority, by overruling *Nippondenso* and finding that the belated allegations are not prohibited, exceeds the statutory authority of the Board and distorts the traditional and appropriate standards for applying the limitations provisions of the Act.

The proviso of Section 10(b) states:

> *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

This short period of limitations reflects a deliberate balancing of interests by Congress and a focus on the overall purposes of the Act by promoting the prompt airing and resolution of labor disputes.

> As expositor of the national interest, Congress, in the judgment that a six-month limitations period did "not seem unreasonable," H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, barred the Board from dealing with past conduct after that period had run, even at the expense of the vindication of statutory rights.

Local 1424 v. NLRB, 362 U.S. 411, 429 (1960). Section 10(b), therefore, "extinguishes liability for unfair labor practices committed more than six months prior to the filing of the charge." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 fn. 9 (1959). Thus, a respondent may not be answerable for those prior events as unfair labor practices.[3] Moreover, conduct occurring within the limitations period may not be found unlawful if such a finding depends on a determination that other conduct occurring outside that period constituted an unfair labor practice.[4] On the other hand, the Board may

[2] The Respondent's vacation policy states, in pertinent part:

> Vacations may be taken at any time agreed upon by the Manager and employee. Plans should be made well in advance and in relation to other so the flow of work is not interrupted. It may be necessary to reschedule or alter scheduled vacations. ROSS will make reasonable efforts to accommodate employee requests in scheduling vacations. Nevertheless, all vacations will be scheduled subject to company needs.

[3] *Bryan Mfg.*, supra at 416–417.

[4] *Recycle America*, 308 NLRB 50 fn. 2 (1992). Id. In *Bryan Mfg.*, the Court considered whether the continued enforcement of a union-security clause constituted an unfair labor practice. The Court held that the allegation was impermissible under Sec. 10(b), because it would require a finding that the parties' execution of the collective-bargaining

consider events outside the 6-month period for evidentiary purposes, "to shed light on the true character of matters occurring within the limitations period."[5]

The Supreme Court in *Fant Milling* held that the Board, in fashioning a complaint, is not strictly limited to the allegations enumerated in the timely charge. The Court noted that the function of the charge in Board proceedings is to initiate an inquiry by the Board, and that the Act left to the Board the responsibility for framing, in the subsequent complaint, the issues to be litigated.[6] The Court relied on its earlier holding, *in National Licorice Co. v. NLRB*,[7] that

> we can find no warrant in the language or purposes of the Act for saying that it precludes the Board from dealing adequately with unfair labor practices which are related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board.

The Court concluded that a complaint allegation that the respondent had unilaterally granted a wage increase was of the same class as, and grew out of, the refusal to bargain alleged in the charge, and therefore was not barred by Section 10(b).[8]

Although *Bryan Mfg*. and *Fant Milling* permit the Board, consistent with Section 10(b), to include certain complaint allegations not mentioned in the charge, the Court in *Fant Milling* also cautioned that the Act does not provide the Board "carte blanche to expand the charge as they might please, or to ignore it altogether."[8] In fact, the holdings of those cases reinforce the limits of the Board's discretion. In *Bryan Mfg*., the Court found that Section 10(b) demands that the public interest in investigating and remedying the alleged current unfair labor practice, the enforcement of a union-security provision negotiated with a minority union, must give way to the need to limit the time during which a respondent may be called upon to account for, and therefore must retain evidence regarding, specific actions. In *Fant Milling*, the Court merely established that, once the jurisdiction of the Board has been invoked through a charge alleging an unfair labor practice, the Act does not require a succession of charges alleging separately each later action taken as a consequence of the conduct described in the initial charge. Neither case, however, authorizes the Board to take a broad scope in litigating conduct that occurred outside the limitations period.

The Board has long accepted that its latitude is narrowly circumscribed to allegations that are "closely related" to those set out in the timely charge. In *Redd-I, Inc.*,[10] the Board articulated a three-part test for determining whether this restrictive standard is met. Under the *Redd-I* test,[11] the Board will consider: (1) whether the new allegations are "of the same class" as the charge allegations, such that they involve the same legal theory and the same section of the Act; (2) whether the allegations "arise from the same factual situation or sequence of events," i.e., they "must involve similar conduct, usually during the same time period with a similar object; and (3) whether the respondent would raise similar defenses, so that it "would have preserved similar evidence and prepared a similar case." Thus, in order to consider otherwise untimely allegations, the Board must find a "close" and substantial relationship to timely allegations based on very specific factors presented in each case. As a matter of law as well as fairness, a general or hypothetical tie will not suffice.

The Board's decision in *Nippondenso*, which my colleagues in the majority now overrule, accurately reflects the principles set out by the Supreme Court, as well as the Board's own test in *Redd-I*. In *Nippondenso*, the timely charge alleged that the respondent had violated Section 8(a)(3) by discharging an employee who was a member of the union organizing committee. The complaint did not include the charge allegation or mention the employee involved, but instead alleged that the respondent had committed a variety of 8(a)(1) violations through the application of its policies on the posting of literature and the wearing of insignia.

The Board, relying on *Nickles Bakery*, found that the General Counsel had not established the necessary factual nexus between the allegation of the charge and those included in the complaint. The Board rejected the General Counsel's contention that the allegations arose from the same sequence of events because the activities of the discharged employee, as a member of the in-house organizing committee, would have triggered the respondent's actions concerning the literature and insignia. Rather, the Board found that the charge and the complaint provided no indication that the alleged conduct arose from a common set of factual circumstances, for example, that the employee had been discharged for activity related to union literature or insignia. The only fact that the alleged violations shared was their occurrence during the same union campaign. This lone fact, the Board concluded, was not a sufficient factual nexus for the purpose of finding the complaint supported by the charge under Section 10(b).

In *Drug Plastics v. NLRB*,[12] the D.C. Circuit Court of Appeals found that the Board had failed to adhere to its

agreement, an event outside the limitations period, was unlawful because the union lacked majority status.

[5] Id. at 416.

[6] *Fant Milling*, supra at 307.

[7] 309 U.S. 350, 369 (1940).

[8] *Fant Milling*, supra at 307.

[9] *Fant Milling*, supra at 307–309, quoting 258 F. 2d 851, 856 (1958).

[10] 290 NLRB 1115, 1118 (1988).

[11] See also *Nickles Bakery of Indiana*, 296 NLRB 927 (1989).

[12] 44 F.3d 1017 (D.C. Cir. 1995), denying enf. 309 NLRB 1306 (1992).

holding in *Nippondenso*. In that case, unlike *Nippondenso*, the 8(a)(3) allegation of the charge, again pertaining to the discharge of an employee, was included in the complaint. The complaint, however, also alleged numerous violations of Section 8(a)(1) that had no apparent connection to the discharge. Whereas the employee had been dismissed on the grounds of violating the prohibition against smoking on the production floor, failing to attend required employee meetings, and excessive absenteeism, the alleged 8(a)(1) violations involved soliciting grievances, creating the impression of surveillance, threatening closure and other reprisals, and granting a wage increase to discourage union support.

Nonetheless, the Board found these additional allegations closely related to the discharge alleged in the charge because they arose from the respondent's overall plan to resist the union; some of the 8(a)(1) allegations involved statements made to the discharged employee (among others); and all of the allegations took place during the same time period.[13] In rejecting the Board's determination, the court found that these reasons amounted to a restatement of the fact found inadequate in *Nippondenso*, i.e., that the events occurred during the same union campaign. Because the Board had not established a proper connection between the charge allegation and those in the complaint, the court held that the Board lacked jurisdiction over the unrelated 8(a)(1) allegations.

In my view, *Nippondenso* properly construes the bounds of the Board's authority under Section 10(b). By ignoring our statutory limitations and overruling *Nippondenso*, the majority overlooks the important policy considerations underlying the limits on that authority, as delineated in the Act and explicated by the Supreme Court in *Bryan Mfg.* and *Fant Milling*.

Facially, the occurrence of different actions by an employer during the same union campaign shows nothing more than a chronological relationship between the actions. The majority does not suggest, however, that a mere temporal nexus, without more, is sufficient to find an otherwise untimely allegation factually related to a timely allegation for 10(b) purposes. The additional element relied on is, of course, the union campaign itself. Yet the majority seems to regard the union campaign as more than a simple factual link between allegations. There is no indication, for example, that a similar connection, such as the occurrence of two alleged violations during the same work project, would be attributed the same significance with respect to the "closely related" standard.

In assigning critical importance to the existence of an ongoing union campaign, such that allegations may be found factually related based on that fact alone, the majority presumes that employer conduct during such campaigns conforms to a standard model. Under this model the employer, upon learning of the union activity among employees, sets in motion a systematic antiunion response, including resort to unlawful conduct. Setting aside the implications of this presumption in terms of legal nexus, it implies that as a factual matter all of an employer's actions during what may be a period of several months, including the conduct of many supervisors with respect to an even greater number of employees, are somehow connected, not only to the campaign, but to one another. In this way, all conduct occurring during these months, no matter how disparate, would be viewed as a single sequence of events and swept up within any timely charge filed with respect to any single employer action. In my view, there is no basis in reality for such a presumption.

The most basic comparison of *Drug Plastics* and the present case reveals the error in the majority's presumption. In this case, the judge and my colleagues find that the violation timely alleged in the charge, the discharge of employee Jumper, occurred as a result of Jumper's activities related to the union campaign. For the reasons discussed below, I agree with that conclusion. In *Drug Plastics*, on the other hand, the Board adopted the judge's finding that the discharge alleged in the charge was wholly unrelated to the ongoing campaign.[14] Although relatedness is judged as of the time of the allegations rather than of the proof,[15] the Board's experience clearly shows, as these cases illustrate, that an action taken during an organizing campaign may or may not bear any relation to it. Common sense suggests that the actions of many supervisors over many months, at different levels of the employer's hierarchy and perhaps at different locations, are more likely to occur independently than to be part of an interwoven design crafted by the employer. Moreover, under the majority's construct, employers would be required to preserve all evidence relating to, and stand ready to defend, all conduct during a union campaign so long as a single incident is alleged in a charge, an effect that runs directly counter to the Congressional purpose in Section 10(b)

Under these circumstances, in my view, presuming that an employer has engaged in an orchestrated campaign of coercion and interference with employee rights is no less repugnant when employed for the purpose of determining relatedness under Section 10(b) than for the ultimate determination of liability. Instead, I would require the General Counsel, in framing complaints that include otherwise untimely allegations, to allege facts regarding the relationship between these allegations and the charge. Consistent with *Nippondenso*, however, I would find that Section 10(b) requires more than the bare

[13] Id., 309 NLRB at 1306.

[14] *Drug Plastics*, 309 NLRB at 1310–1311.

[15] Id., 44 F.3d at 1019.

fact of their occurrence during the same union campaign.[16]

Applying these principles to the facts of the instant case, I would find the complaint allegations pertaining to Simondi's statement of an overbroad no-solicitation rule and Morrison's statement that "he would do anything in his power to keep the Union out of the building" are factually unrelated to the charge allegation concerning Jumper's discharge, and therefore time barred under Section 10(b). The record here does not demonstrate that the Respondent undertook a deliberate or systematic anti-union effort that included these otherwise disparate actions. Although Simondi made his statement regarding the ban on solicitation to Jumper and another employee after they had posted union literature in the men's restroom, there is no indication that Morrison was aware of this incident at all, much less that it played any part in his decision to discharge Jumper almost 3 months later. In addition, Morrison's statement, in a meeting of employees, was not directed at Jumper and did not suggest that he would resort to unlawful means, including discharge, in order to avoid the Union. Therefore, I would dismiss these allegations.[17]

2. I agree with the majority that the Respondent violated Section 8(a)(3) and (1) by discharging Jumper based on his activities on behalf of the Union. In accordance with *Wright Line*,[18] the General Counsel established that Jumper was involved in union activity as a member of the organizing committee and that the Respondent was informed of his involvement by the Union's June 1 letter. In addition, Simondi's promulgation of an overbroad no-solicitation rule in response to Jumper's posting of union literature demonstrates anti-union animus by the Respondent.[19]

Moreover, I find that the Respondent failed to rebut the General Counsel's prima facie case. Although Jumper had an unsatisfactory attendance record, and we should be hesitant to substitute our judgment for that of employers,[20] the Respondent did not show that it in fact followed the policy, described in Hoch's testimony, requiring that all time off must be scheduled in advance.[21] On the contrary, the record shows that other employees had requested and been granted time off, including both vacation days and personal holidays, without prior scheduling. Under these circumstances, I find, in agreement with the judge, that the Respondent discriminatorily assigned Jumper his final point under the progressive discipline policy, which resulted in his discharge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting International Ladies Garment Workers Union, Local 170, AFL–CIO, or any other union.

WE WILL NOT promulgate or threaten to enforce rules which prohibit you from engaging in union solicitations on nonworktime in nonwork areas of the facility.

WE WILL NOT in any like or related manner intefere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer David Jumper full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make David Jumper whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlaw-

[16] See, e.g., *Pioneer Hotel v. NLRB*, 182 F.3d 939 (D.C. Cir. 1999) (dismissal of supervisor for refusing to fire employee closely related to alleged discharge of employee); *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935 (4th Cir. 1995) (allegations regarding actions taken by same managers against same employees in response to same catalyst arose from same factual circumstances or sequence of events); cf. *Sam's Club v. NLRB*, 173 F.3d 233, 244–248 (4th Cir. 1999) (allegations concerning actions of different managers at different times during union campaign not factually related, where no evidence that employer was pursuing an effort to discourage union support through unlawful means).

[17] Although I find that the allegation regarding Morrison's statement is barred by Sec. 10(b), I further find that the statement is protected by Sec. 8(c) of the Act, and dismiss on the merits.

[18] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 393–403 (1983).

[19] Although I have found that the Respondent is not liable for this conduct as an unfair labor practice under the provisions of Sec. 10(b), it is relevant as evidence pertaining to the timely filed discharge allegation. See *Bryan Mfg*., 362 U.S. at 416. However, I do not rely on Morrison's statement, which I find to be lawful, as a demonstration of animus. See my dissent in *Lampi LLC*, 327 NLRB 222, 225 fn. 7 (1998).

[20] Cf. *NLRB v. GATX Logistics, Inc.*, 160 F.3d 353, 357 (1998).

[21] The judge discredited Hoch's testimony. The judge further found that, although the Respondent's employee handbook states that vacation time should be scheduled in advance, it also states that vacation days and personal holidays may be taken at any time agreed upon by the employee and the manager.

ful discharge of David Jumper, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

ROSS STORES, INC.

Dean Lawrence Burrell, Esq., for the General Counsel.
James P. Valentine, Esq. (Rosenn, Jenkins & Greenwald), for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Carlisle, Pennsylvania, on February 7 and 8, 1994, based upon charges filed on October 21, 1993 (as amended), by David L. Jumper, an individual, and a complaint issued by the Regional Director for Region 5 of the National Labor Relations Board (the Board), on March 18, 1994. The complaint alleges that Ross Stores, Inc. (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act), by discharging David L. Jumper because of his union activity and by otherwise interfering with, restraining, and coercing employees in the exercise of their statutory rights. Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Ross Stores, Inc., a corporation, is engaged in the retail sale of clothing with stores throughout the United States and a distribution center in Carlisle, Pennsylvania. The Carlisle facility is the only one involved in this proceeding. Jurisdiction and labor organization status are not in dispute. The complaint alleges, Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the International Ladies Garment Workers Union, Local 170, AFL–CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Issues

1. Whether the allegations of the 8(a)(1) violations are time barred by Section 10(b) of the Act? I find that they are not.

2. If not, whether Respondent violated Section 8(a)(1) by threatening its employees and by prohibiting union solicitation on its premises? I find that it did.

3. Whether Respondent discriminatorily discharged David L. Jumper in violation of Section 8(a)(3)? I find that it did.

B. Section 10(b)

The original charge was filed on August 13, 1993. It alleged that the Respondent had discharged Jumper "due to union involvement," i.e., in violation of Section 8(a)(3), although it failed to spell out the specific subsection of the Act relied upon. It was not until March 4, 1994, that the charge was amended to allege conduct independently violative of Section 8(a)(1). That conduct, it asserted, occurred in May and June 1993. Respondent contends that the 8(a)(1) allegations are time barred by Section 10(b).

To the extent relevant, Section 10(b) provides:

> *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.

Discussion of this issue must begin with *Nickles Bakery of Indiana*, 296 NLRB 927 (1989). Therein, the sole substantive allegation of the complaint was of an unlawful no-solicitation rule in violation of Section 8(a)(1). The charge, however, had only alleged specific 8(a)(3) discrimination against the charging party. It also contained the "boilerplate" or "catchall" language asserting that "[b]y the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of rights guaranteed in Section 7 of the Act." Respondent moved to dismiss the complaint under Section 10(b).

The Board reviewed the Statute, the precedents, and its regulations. Based thereon, it concluded that reliance on the "boilerplate 'other acts' language to support unrelated 8(a)(1) complaint allegations contravenes 10(b)'s mandate that the Board 'not originate complaints on its own initiative' and 'renders meaningless the specificity required by Section 102.12(d) of the Board's Rules and Regulations.'" Id. at 928. It held that "8(a)(1) complaint allegations must be closely related to the allegations or subject matter set forth as the basis for the underlying charge." Id. at 929.

In *Nickles*, the Board applied the "closely related test" as promulgated in *Redd-I, Inc*., 290 NLRB 1115 (1988). Under that test:

> To determine whether a charge adequately supports a complaint allegation, the Board considers: (1) whether the charge and complaint allegations involve the same legal theory, and (2) whether they arise from the same factual circumstances. The Board also may look at whether a respondent would raise similar defenses to both allegations. *Lovejoy Industries*, 309 NLRB 1085, 1086 (1992).[1]

In further discussing what conduct might be considered to have a sufficient nexus to that which was alleged in the charge, the Board in *Nickles* (at fn. 7) cited several circuit court decisions. Thus, it noted that in *G.W. Galloway Co. v. NLRB*, 856 F.2d 275, 280 (D.C. Cir. 1988), the court had indicated that if a strike was engaged in to protest a discharge which was itself alleged in a timely charge, that charge would "likely" support allegations concerning threats to or the discharge of those strikers. The Board further noted that the court in *Galloway* had cited *NLRB v. Central Power & Light Co*., 425 F.2d 1318, 1321 (5th Cir. 1970); and *NLRB v. Braswell Motor Freight Lines*, 486 F.2d 743, 746 (7th Cir. 1973). In the first case, the court had found a sufficient relationship where the "acts . . . are part of the same course of conduct, such as a single campaign against a union." In the second, the requisite nexus existed where the acts were all "part of an overall plan to resist organization."

[1] In *Lovejoy*, the Board, with Member Devaney dissenting, found that an allegation of disparate enforcement of a rule limiting the wearing of a union T-shirt was not closely related to a charge allegation of discriminatory issuance of a written warning for low production.

In *Jennie-O Foods*, 301 NLRB 305 (1991), the Board reaffirmed its holding in *Nickles* and pointed out that "[n]either the Board in *Nickles* nor the *Braswell* court require that the charge allege an overall plan to resist unionization."

I find that the 8(a)(1) violations alleged in the instant complaint may be considered as they are sufficiently related to Jumper's timely filed 8(a)(3) charge. Here, as in *Drug Plastics & Glass Co*., 309 NLRB 1306 (1992), the charge alleged the discharge of one employee because of his union activities. The complaints in both alleged the discharge and contemporaneous 8(a)(1) interference. The 8(a)(1) allegations concerned conduct which arose out of the employer's overall efforts to resist the union, they occurred after the employer gained awareness of the union campaign and the alleged discriminatee was directly or indirectly subjected to the interference. In both, that interference was evidence of union animus supporting and necessarily considered in regard to the 8(a)(3) allegation. *Drug Plastics*, where the Board found the 8(a)(1) allegations to be "closely related," is virtually "on all fours" with the instant case; the 8(a)(1) allegations there were not deemed time barred.[2]

C. Union Activity and Knowledge

The 150 to 200 employees in Respondent's Carlisle,

Pennsylvania distribution center are not represented by any labor organization. Union activity among them began in about May 1993.[3] David Morrison, Respondent's vice president for distribution, who was in charge of the Carlisle facility, learned of that activity about May 13 from employee comments to other managers. On June 1, the Union sent Morrison a letter, officially advising him of the activity and naming 15 employees who comprised the organizing committee (G.C. Exh. 3). Included among the 15 were David Jumper, the charging party, and Kathy Curtis, his fiancee. The letter was widely distributed in the facility, among both managers and rank-and-file employees.

D. Alleged Prohibition on Union Solicitations

Respondent's handbook (G.C. Exh 10) contains the following valid no-solicitation and no-distribution policy:

> Employees may not solicit for any purpose during the work time of either the employee soliciting or the employee being solicited. Work time is defined as all time an employee's duties require the employee to be engaged in work tasks (but does not include meal periods, scheduled rest periods, or time before or after the employee's shift).
>
> Employees may not distribute literature of any kind during work time (defined above), nor may employees distribute literature of any kind in work areas at any time.

Another version of the rule, promulgated in an August 27, 1991 memo to the employees, stated that it was "ROSS policy that no solicitations, collections, distribution of literature or circulation of petitions by employees is permitted during working time or in working areas." It specifically prohibited employees from selling personal goods or services on company property or during work time or from requesting donations from fellow employees. (G.C. Exh. 4.) This "enhancement" of the handbook's policy statement, as it was described by Michael Simondi, the operations manager, excluded solicitations for company-sponsored charities and activities.

On a morning in late May or early June, Jumper and another employee posted union literature in the men's room, adjacent to the work floor. They were observed leaving the men's room by Michael Simondi, who then observed their postings in the bathroom. Simondi removed the posted materials to his office.

Simondi then went to each of the two employees, separately. He told Jumper that "there was no solicitation on these premises." He did not mention the postings in the men's room[4] and the employees received no formal warning or other discipline.

Jumper and several other employees described other solicitations taking place on the work floor, for such things as Tupperware, Home Interiors, and various charitable or civic activities. While it was intimated that such activities were widespread, there was no evidence of management's awareness of such activities.

Simondi's expression of the rule to Jumper, prohibiting soliciting "on these premises," like the August 1991 policy statement upon which it may have been based, is unduly broad. An employer may not prohibit employees from union solicitations on its premises so long as they, and the employees being solicited, are on their own time. *Ultrasystems Western Constructors*, 310 NLRB 545, 546, 552 (1993); *Our Way, Inc*., 268 NLRB 394 (1983); and *Stoddard-Quirk Mfg. Co*., 138 NLRB 615 (1962). I find his statement to violate Section 8(a)(1) as the promulgation of an overly broad no-solicitation rule and as an implied threat of discipline for violations of that overly broad rule.

The General Counsel argues further that Respondent's disparate failure to control solicitation which is not on a union's behalf while "taking aggressive steps" upon the advent of union activity is additionally violative. There is no evidence of "aggressive" enforcement of its no-solicitation rule. More significantly, General Counsel has failed to establish employer knowledge of the other solicitations, a prerequisite to a finding of disparate treatment.

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[2] That the discharge was ultimately found to be unrelated to the union campaign and not in violation of Sec. 8(a)(3) was deemed irrelevant to the question of whether the Section 8(a)(1) and (3) allegations were closely related. Respondent here relies upon *Nippondenso Mfg. U.S.A.*, 299 NLRB 545 (1990). The Board in *Drug Plastics* found *Nippondenso* distinguishable. In *Nippondenso*, like *Drug Plastics* and the instant case, the charge alleged only an 8(a)(3) violation. However, unlike *Drug Plastics* and the instant case, the General Counsel did not proceed on that allegation; the *Nippondenso* complaint contained only the 8(a)(1) allegations which had never been the subject of a charge.

[3] All dates hereinafter are 1993 unless otherwise specified.

[4] Simondi recalled this as occurring around June 4, which would place it after the Company's receipt of the Union's notification letter. He claimed that he only asked each of the employees if he was aware that the Company "had a no-solicitation policy on the work floor." I credit Jumper, noting that the statement Jumper attributed to Simondi is consistent with the August 1991 "enhancement" of the no-solicitation rule and with Simondi's overly broad view of what the work areas included. He deemed the bathrooms to be part of the work floor and said he would prohibit solicitations in them. A rule prohibiting employees from engaging in union activities while on a restroom break is overly broad. *BRC Injected Rubber Products*, 311 NLRB 63, 74 (1993). The other employee, Charles Voight, who had also been listed in the June 1 letter as a member of the organizing committee, did not testify.

E. Morrison's Alleged Threat[5]

In late May, Morrison addressed Respondent's gathered employees at what appears to have been a regularly scheduled quarterly meeting. He opened that meeting with some words about the union campaign, acknowledging the ongoing activity, telling them that they did not need a union and saying that, "he would do anything in his power to keep the union out of the building."[6] Such statements convey or imply a willingness to take reprisals against employees in order to prevent them from achieving union representation and thereby violate Section 8(a)(1). *Great Dane Trailers*, 293 NLRB 384 (1989); *Hickory Creek Nursing Home*, 295 NLRB 1144 (1989); *Morrison Cafeteria Co.,* 214 NLRB 523, 524 (1974).[7]

F. Jumper's Discharge

1. Attendance policy

Respondent's attendance policy is based upon the assignment of points for different types of absenteeism or tardiness. Accumulation of certain numbers of points within an annual review cycle, i.e., from one anniversary date to the next, leads an employee through the steps of a progressive discipline system.

Thus, according to the policy statement which Jumper acknowledges having received, employees receive 1 point for each day absent but calling in, to a maximum of 2.5 points for any single period of such absences, 2 points for an absence without having called in,[8] and .5 points for being more than 22 minutes tardy or for three more minor incidents of tardiness within a pay period.

An employee who accumulates 7.5 points within the review cycle receives a verbal warning. At 11 points, a written warning is issued, at 11.5 points, there is a final written warning, and above 11.5 points, an employee "could" be terminated. (G.C. Exh. 12.) Each step of the progressive discipline must be followed. An employee may accumulate more than the minimum points (depending on the order in which they were accumulated) before receiving a given level of warning.

For example, an employee who had accumulated 6.5 points who is then absent for 3 or more days, who had called in, would receive the maximum of 2.5 points, bringing him (or her) to a total of 9, but would only receive a verbal warning. The next incident, even if it brought the point total to more than 11 points, would only result in a written warning. If an employee had 7 points prior to receiving any warning and then earned points on three more occasions in the maximum amount of 2.5 points each time, he would get a verbal warning at 9.5 points, a written warning at 12 points and a final written warning at 14.5 points. That number of points, it would appear, is the most any employee could accumulate in any one year without progressing all of the way through the disciplinary steps and being discharged. As the record demonstrates, some employees accumulated significantly more than 11.5 points but were not discharged because they had not progressed through all four steps of the progressive discipline.

One employee, Melissa Foster, earned more than 14.5 points. It appears, however, that she accumulated these points in the course of a "focal" or appraisal year, from February 1, 1992 to February 1, 1993, and not necessarily within a review cycle, between anniversary dates.[9] The record does not show how many points Foster accumulated in any review cycle. It therefore does not support a conclusion that she was treated any differently from the Charging Party. To the extent that the General Counsel argues that the fact that employees accumulated more than 11.5 points without being discharged establishes disparate treatment of Jumper, his argument is based upon a misunderstanding of the attendance policy and is rejected.

On the employees' anniversary date, the record clears and all points are removed. However, Respondent has a second attendance policy applicable to those employees who had received a final written warning in the preceding year. Under that policy, the verbal warning stage is eliminated. An employee subject to that policy receives a written warning at 7.5 points, a final written warning at 8 points (i.e., the next infraction), and "Possible Termination" with more than 8 points. Here, as under the first-year policy, an employee is entitled to progress through each of

[5] The complaint identified the purported violation as a statement by Morrison creating the impression that selection of a union would be a futile act. The General Counsel's witnesses testified to a threat to close the plant in the event they elected a collective-bargaining representative. General counsel's brief blends the two, asserting that the "threat to close the facility did no more than point out to the employees the futility of engaging in their protected rights." Respondent argues that it neither threatened plant closure nor futility. However construed, Morrison's remarks were fully litigated.

[6] In resolving the credibility issue involved in this allegation, I have primarily relied upon the credibly offered testimony of Bartley Olewiler, a member of the Union's organizing committee and witness proffered by the General Counsel. Olewiler recalled Morrison's statement as set forth above. Respondent referred in brief to that testimony as being "consistent with the testimony of Mr. Morrison and Mr. Simondi regarding the content of the May 27, 1993 meeting.'' Olewiler also recalled that other matters were discussed after the remarks about the union activity, consistent with Respondent's contention that these remarks were made at a regularly scheduled quarterly meeting. That contention is further supported by Respondent's June 7 letter to the employees, referring back to Morrison's remarks as having been made in the "employee meeting the week before last," thus placing it in late May, rather than in June as the other employee witnesses recalled. I note that Jumper's pretrial affidavit asserted that Morrison had spoken at a "corporate meeting" held sometime "prior to May [sic] 4th and had said that "there would be no union in the plant." That affidavit contained no reference to any threat to close the plant. I am compelled to reject the testimony of those witnesses, including Jumper, who claimed that Morrison threatened to shut or close the doors if a union came in. I similarly reject the Testimony of Morrison and Simondi to the effect that Morrison carefully limited his remarks by stating that he "will do everything in [his] power to *legally* prevent this Union from coming in to our distribution center.'' (R. Exh. 2, Emphasis added.) The latter statement was made by Morrison in the letter of June 7, along with other expressions of management opposition to unionization. It was also in what Morrison described as his script for the quarterly meeting. I find that he did not read that sentence as written in that script.

[7] The Board's adoption, without comment, of the ALJ's holding to the contrary in *Standard Products Co*., 281 NLRB 141, 147–148 (1986), appears to be either an aberration or, quite possibly, the result of an inadvertent failure to note that no exception had been taken to that conclusion. See fn. 1, therein, noting that no exceptions were taken by the General Counsel to another finding involving the same manager. I note that in the more recent decisions cited above, the Board's amended conclusions of law expressly refer to that threat (*Hickory Creek*) or provide an explicit remedy therefor (*Great Dane*).

[8] Under the attendance policies as set forth in the employee handbook, three consecutive days of absence without notice to one's manager is considered job abandonment, leading to a conclusion of voluntary termination. (G.C. Exh. 10, p. 9.)

[9] Her date of hire would appear to be September 10, 1990. (See G.C. Exh. 25.)

the disciplinary steps, albeit that he or she now has only three, rather than four steps, available.[10] (R. Exh. 8.)

2. Jumper's attendance record

David Jumper had an attendance problem. He had received a final warning for absenteeism on September 23, 1991, during his probationary period. (R. Exh. 9.) In his first full year, he received a verbal warning at 9 points on January 23, 1992, a written warning at 11 points on February 27, 1992 and a final written warning at 11.5 points on April 3, 1992. (R. Exhs. 10, 11, and 12.) He had no further incidents before his anniversary date of August 19, 1992 and his record cleared on that date.

In his second full year, Jumper received a written warning on March 22, 1993, at 7.5 points, and a final written warning on May 4 upon reaching 10 points. (R. Exhs. 13 and 14.) He experienced no further attendance problems until August 12.

3. Jumper's discharge

On August 11, Kathy Curtis, with whom Jumper lives, suffered a blow to the abdomen while at work. That night, both Jumper and Curtis spent the greater part of the night at the hospital. Curtis was diagnosed as having an abdominal wall hematoma and instructed to return to the hospital on the following morning for an ultrasound test to rule out a more serious injury. Jumper felt it incumbent upon him, as her companion, to provide her with transportation to the hospital and remain with her.[11]

Jumper reported to work at 7 a.m. and immediately asked to speak with Bill Fort, an operations manager. He explained what had happened, showed Fort a doctor's note and the patient instructions given to Curtis (G.C. Exhs. 6 and 7) and described his predicament. He asked how he could take the day off without accumulating more points. Jumper had a day off already scheduled for August 16 (his birthday holiday) and asked if that could be switched to August 12. Fort was unable to make a decision and the issue was passed along the managerial line to John Taylor and Kirk Fisher. They were unable or unwilling to make any decision and suggested that Jumper wait until Paula Hoch, the human resources specialist, arrived. Jumper called Curtis and determined that her appointment was set for 8:45 a.m. Jumper was instructed to go to work until Hoch arrived, and, he complied.

At about 8:15 a.m., Taylor accompanied Jumper to Hoch's office. Jumper described, once again, the situation and his need to take the day off. He asked whether he could switch the previously arranged personal vacation day to that day. They told him that he could not do so because a vacation day had to be requested in advance. Time was running short and Jumper told Hoch to either give him the day off or the points, but he was leaving. She warned him of the consequences (additional points) if he left and he left. Jumper did not request a vacation day other than that which he had previously scheduled for the following week and Hoch did not know if he had any vacation time left to be taken.

Hoch reported what had taken place to Morrison who made the decision to discharge Jumper. When Jumper reported to work on August 13, he was met by Morrison and Hoch. Morrison told him that he was discharged for violating the attendance policy. Jumper asked, "What about Kathy?" and was told that she had nothing to do with the matter. He asked how many points he had accumulated and was told, by Hoch, "Around 15.'' In fact, the total would have been 10.5 or 11, less than 15 but still more than the minimum 8 points required for discharge of one in Jumper's situation.[12]

3. Vacation and holiday approval policy

Respondent provides its employees with paid vacations depending on length of service and nine paid holidays, including the employee's birthday, the anniversary of his or her employment and, after one year, an additional personal holiday. Pursuant to the policies set forth in the employee handbook, those days must be taken within 12 months of the date on which they were earned. The personal holidays "can be taken at a time agreed upon by the Store Manager and the employee." There does not appear to be any written requirement, in the handbook or elsewhere, that birthday or anniversary holidays or personal days be scheduled in advance. No document so requiring was proffered.

With respect to the scheduling of vacations, the handbook (p. 36) provides:

> A vacation request must be filled out by ALL employees.
>
> Vacations may be taken at any time agreed upon by the Manager and employee. Plans should be made well in advance and in relation to others so the flow of work is not interrupted. It may be necessary to reschedule or alter scheduled vacations. ROSS will make reasonable efforts to accommodate employee requests in scheduling vacations. Nevertheless, all vacations will be cheduled subject to company needs.

4. Asserted disparate treatment

Hoch testified that "any scheduled time off needs to be requested in advance." As noted, other than the handbook language quoted above, no published rules or company policy so provides. According to Hoch, such a rule was necessary because of the Employer's need to be able to plan workloads.

In practice, employees have been granted vacation time off, in full and one-half day segments, with their requests having been made on the same day that the leave was taken. In some cases, employee vacation leave requests have been dated, and approved, after the leave has commenced or been completed. (See, for example, G.C. Exhs. 21, 24, 30, and 31.)

According to Hoch, vacation time and personal days were treated differently. She explained that, unlike vacation time, which was earned and could be taken in blocks of 4 hours, the birthday, anniversary, and personal days were earned and had

[10] Jumper denied any knowledge of this aspect of the policy. However, warnings given him in the second year, which precede any union activity, referred to the second-year policy and evoked no protest from him. (R. Exhs. 13 and 14.) See also G.C. Exh 19, issued to employee Timothy Kiner on February 25, 1993, which stated that "Tim also is aware that he is subject to a written report at 7.5 points in a consecutive year." I find that the policy applicable to employees in their second consecutive year of attendance problems was in effect at all relevant times.

[11] It is irrelevant that, unbeknownst to Respondent, Jumper did not have a valid driver's license.

[12] Hoch claimed that she knew Jumper was on a final warning but did not know his exact point count. Whether his actions earned him .5 points for leaving early or 1 point as an absence is irrelevant. He was on a final warning and any additional points pushed him over the 8-point limit allowed an employee in his second consecutive year of attendance problems.

to be taken as full days of 8 hours. Because of this, she stated, these days had to approved in advance.

Notwithstanding Hoch's contentions, Debra Jumper[13] credibly testified that, at some time in the past, she had requested and been granted her birthday holiday off on a day in which she had already worked for a couple of hours. That request, she said, was granted even though it meant losing the pay for the time she had put in prior to making the request.[14] I note that, had David Jumper's request been granted when he first came in and asked for the day off on August 12, he would not have had to forfeit any pay.

In light of the extensive evidence that the employer did grant last minute requests for vacation leave, including requests made in the morning for leave to be taken later that day, I cannot accept Hoch's assertions that there was a rule requiring advance approval for all leave. Were such a rule in existence and known to them, it would have been unlikely that the three managers to whom Jumper presented his request on the morning of August 12 would have been unable to decide how to respond.

Neither can I accept Hoch's claim that vacation time and personal holidays required or were accorded different treatment. At least one employee, I have found, has been allowed to take such a holiday off at the very last minute.[15] Further, at least as to the question of whether the Employer's scheduling requirements mandated a rule requiring advance approval, I can discern no difference between vacation leave and birthday or anniversary holiday leave. Last minute absences for either would have an identical impact upon Respondent's ability to get the work out. I would also note, in this regard, that Jumper was a maintenance worker, one of three in his department. When any one of the three was absent, Respondent did not bring in a replacement but functioned with just the remaining two.

Jumper, in a unique emergency situation, requested to use his previously scheduled birthday holiday so as to avoid the accumulation of a terminal point. His request was denied and, as a result, he was discharged. That denial, I find, was not consistent with the Employer's practice with respect to other employees or mandated by its rules.[16]

5. Analysis

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical mode for resolving discrimination cases turning upon the employer's motivation. Under that test, the General Counsel must first:

> make a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is one that the respondent desires to conceal. The motive may be inferred from the total circumstances proved. Under certain circumstances, the Board will infer animus in the absence of direct evidence. That finding may be inferred from the record as a whole. [Citations omitted.]

Fluor Daniel, Inc., 304 NLRB 970 (1991).

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co*., 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; even without direct evidence. Evidence of suspicious timing, false reasons given in defense and the failure to adequately investigate alleged misconduct all support such inferences. *Adco Electric*, 307 NLRB 1113, 1128, (1992), enfd. 6 F.3d 1110 (5th Cir. 1993); *Electronic Data Systems Corp*., 305 NLRB 219 (1991); *Visador Co*., 303 NLRB 1039, 1044 (1991); *Associacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988); *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

I am satisfied that the General Counsel has established the requisite prima facie case on the record before me. Jumper was involved in the union activity from the start, management was aware of his activity, it possessed animus toward that activity as expressed in two independently coercive acts, one of which was expressly directed at Jumper, and he was discharged while the campaign was going on. Moreover, it cannot be denied that the discharge of an organizing committee member would tend to discourage continued union activity. *Stoody Co*., 312 NLRB 1175, 1182 (1993).

Jumper had a serious attendance problem. He had acquired the requisite number of points, at the final warning stage, to be terminated. Based thereon, Respondent asserts that it has met its burden of showing that he would have been discharged even if he had not been engaged in any union activity. I find, however, that General Counsel has rebutted that defense and shown that the terminal point assigned to Jumper for his August 12 absence was discriminatorily and disparately assigned. Had he been treated like any other employee, he would have been allowed to switch the birthday holiday which had been scheduled for 4 days later, to apply it to the emergency situation with which he was confronted. He would not have received any points for the August 12 absence and, had he avoided any attendance faults for but 1 week more, his record would have cleared. I must conclude, based on the *Wright Line* analysis, that this discrimination was motivated by Jumper's union activity, and violated Section 8(a)(3).[17]

[13] No relation to the Charging Party.

[14] Hoch testified that she found no record of Debra Jumper having done so and adduced documents showing that Miss Jumper had not done so in 1994. Although the leave requests are apparently routinely retained, she did not adduce any such documents establishing that Miss Jumper had not done so in a prior year and Miss Jumper's testimony does not preclude that possibility.

[15] It is logical to assume that this would not happen very often because employees would be reluctant to waive payment for hours already worked in order to take such a holiday off after the start of a shift.

[16] As noted above, I have not found evidence of disparate treatment of Jumper with respect to the application of the point-progressive discipline system. I would note, however, that the language of Respondent's rules is permissive rather than mandatory. Those rules provide that employees "could" be terminated or were subject to "possible termination" for exceeding the maximum points in a single review cycle. (G.C. Exh. 12, R. Exh. 8.) The handbook (G.C. Exh. 10, p. 18) similarly provides Respondent with latitude to be either more lenient or more strict in applying its disciplinary procedures.

[17] I would infer the essential hostility toward union activity from the entire record, including the disparate treatment, even in the absence of

CONCLUSIONS OF LAW

1. By promulgating or threatening enforcement of an unduly broad no-solicitation rule, and by threatening that the Employer will do anything in its power to keep the Union out, thus implicitly threatening the employees with reprisals for their union activities. the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging David Jumper because of his union activity, the Respondent has violated Section 8(a)(3) and (1) of the Act.

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the 8(a)(1) violations found above. *Casey Electric*, 313 NLRB 774 (1994); *Weco Cleaning Specialists*, 308 NLRB 310 (1992).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]